

**AJITH
vs
ATTORNEY GENERAL**

COURT OF APPEAL
SISIRA DE ABREW. J
UPALY ABEYRATNE. J
CA 212/2003
HC AMPARA 725/2002
JULY 28, 29, 30, 2009

Kidnapping - Rape - Victim reliable witness or not? - Court should seek corroborative evidence - If not reliable? - Opinion of medical experts - Court to act on the opinion of the independent medical expert?

Held:

- (1) If the prosecutrix in a rape case is not a reliable or believable witness, the evidence seeking to corroborate her story cannot strengthen her evidence. Court should seek corroborative evidence only if the prosecutrix is a reliable witness.

Per Sisira de Abrew. J:

“Refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury”.

- (2) When opinions of medical experts are led in evidence and if one expert is not an independent witness, Court should act on the opinion of the independent medical expert and should not place reliance on the other expert.

APPEAL from the judgment of the High Court of Ampara.

Cases referred to:-

1. *Sunil and another vs. Attorney General* 1986 1 Sri LR 230
2. *Gurcharan Singh vs. State of Haryane* AIR (1972) SC 2661
3. *Bhoginbhai Hiribai vs. State of Gujarat* 1983 AIR SC 753

Dr. Ranjith Fernando for accused appellant.

Sarath Jayamanne DSG for AG

July 30, 2009

SISIRA DE ABREW, J.

The accused-appellant in this case was convicted for kidnapping a girl named Samitha Jeevani Kumari Basnayake and was sentenced to a term of 5 years rigorous imprisonment and to pay a fine of Rs. 7500/- carrying a default sentence of 18 months rigorous imprisonment. He was also convicted for raping the said girl and was sentenced to a term of 10 years rigorous imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of 2 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence the accused-appellant has appealed to this Court. Facts of this case may be briefly summarised as follows:-

The accused-appellant was known to the prosecutrix in this case as he was a teacher of her school. On the day of the incident around 12.30 p.m. when the prosecutrix was returning home after a tuition class the accused-appellant dragged her to a lonely place in the jungle which is about 40 meters away from the road. Vide page 147 of the brief. He thereafter removed all her clothes including the vest and undergarment against her will. He removed his clothes as well. Thereafter the accused-appellant put the prosecutrix on the ground and committed sexual intercourse on her against her will. She stated that the place where the sexual intercourse was committed was a rough surface. After the incident she noticed bleeding from her vagina. Vide page 92 of the brief. According to her there were abrasions on her legs. Vide page 151 and 163 of the brief. It has to be noted, at the very inception, that although she says that there were abrasions on her legs, Dr. Herath and Dr. Gunasekera the Medical Officer and the District Medical Officer respectively did not observe abrasions on her legs when they examined her on the 24th of March (the following day of the incident). Although the prosecutrix complains that the sexual intercourse was committed on a rough surface it has to be

noted here that the doctors who examined the victim on the following day did not find any abrasions on her back side. Learned D. S. G., heavily relied on the evidence of Gunapala. According to Gunapala he saw the accused-appellant on the top of the body of the victim when he came to the place of incident to fetch water for his cows. At this time the accused-appellant was fully naked. The victim was wearing a skirt. Gunapala is an uncle of the victim. Although the victim says that accused-appellant dragged, removed her clothes, forcibly put her on the ground and committed sexual intercourse against her will, she did not make any complaint to Gunapala when he saw the incident. Vide page 433 of the brief. Instead of complaining she pleaded with him not to tell her mother. Vide page 434 of the brief. If the incident described by the victim was committed by the accused-appellant, one would expect her to complain immediately when the incident was witnessed by Gunapala who is an uncle of the victim. This conduct of the victim raises a serious doubt about the truthfulness of her story.

The most important question that must be decided in this case is whether the victim is a reliable witness or not. In order to find an answer to this question I must consider the medical evidence in this case which played an important role. Dr. Herath who was the Medical Officer in charge of the hospital examined the victim on 24th of March (the following day of the incident) at 8.15 p.m. He used two torches to examine the victim since the electricity supply, given to the hospital was not sufficient enough. He examined the victim from head to the foot but did not find any injury on her body. He did not find a hymen in her vagina. He further says that he examined the vagina but did not find any blood or semen. Within 15 minutes of his examination he got down the District Medical Officer Dr. Gunasekera and requested him to examine the victim. Vide page 679 to 681 of the brief. Dr. Gunasekera who examined the patient did not find any injuries on her body. When he examined the vagina he did not find any fresh injuries nor did he find any blood in the vagina. At this stage

it is relevant to note that according to the victim she was a virgin prior to the incident described by her and that she was bleeding from her vagina after the incident. Vide page 92 and 127 of the brief. According to the doctor if she was a virgin and the sexual intercourse was committed on the 23rd of March, he would expect blood on her vagina. He further says that in such an event he would expect blood on the gloves that he used to examine the victim's vagina. The evidence of the two doctors, therefore, raises a serious doubt in the testimonial trustworthiness of this story of the prosecutrix. According to both doctors they did not find any fresh injury on the body of the victim on the 24th of March. Quite surprisingly in the following morning (25th) Dr. Herath found abrasions on the hand of the victim. Vide page 682 of the brief. After the said evidence of Dr. Herath, on the application of the defence Counsel, victim was recalled and questioned about the injuries found on her hand. The victim admitted that after the examination by two doctors namely Dr. Herath and Dr. Gunasekera at Maha Oya Hospital her father came and inflicted abrasions by abrading her hand. This evidence was not challenged by the prosecution. Vide page 698 of the brief. It is therefore seen that the father of the victim had fabricated evidence to establish the charge against the accused-appellant or to strengthen the version of the victim. This item of evidence raises a very serious doubt in the truth of the prosecution case. On the 25th of March Dr. Gunasekera, the D. M. O. of the Maha Oya Hospital, transferred the victim to Ampara Hospital apparently to get a report from the V.O.G. Dr. Lankathilaka Jayasinghe who was not a V.O.G. examined the victim in Ampara Hospital. He found two ruptures in the hymen and expressed the opinion that they were fresh injuries. He stated that these injuries were 3 to 4 days old. Vide page 250 of the brief. Therefore it appears that there are two expert medical opinions expressed by three doctors. At this stage it is relevant to consider the conduct of Dr. Lankathilaka Jayasinghe. According to the evidence led at the trial after the discharge of the victim from Ampara

Hospital Dr. Jayasinghe with some members of the hospital staff visited the girl at home and gave her Rs. 300/- Vide page 688 of the brief. Dr. Lankathilaka Jayasinghe further instructed the girl not to marry the accused since the victim was underage. This instruction was given to victim's mother. Vide page 392 of the brief. When the victim said that she was sent home by the principal of the school, Dr. Jayasinghe remarked that the principal should be sent to jail. He further said that he would send newspaper reporters. Vide page 688 of the brief. His conduct therefore shows that he had taken an undue interest in this case. Considering all these matters I conclude that Dr. Jayasinghe was not an independent witness in this case. When opinions of medical experts are led in evidence and if one expert is not an independent witness Court should act on the opinion of the independent medical expert and should not place reliance on the other expert. There is no evidence in this case to say that Dr. Herath and Dr. Gunasekera are not independent witnesses. When I consider all these matters I hold that it is safe to place reliance on the opinions expressed by Dr. Herath and Dr. Gunasekera. According to the opinions expressed by Dr. Herath and Dr. Gunasekera victim did not have fresh injuries in her vagina nor did they find any bleeding in the vagina. Victim says she was a virgin prior to the incident and noticed blood in her vagina soon after the alleged sexual intercourse. But the two doctors who examined the victim on the following day did not find fresh injuries in her vagina. According to the prosecutrix she was dragged a distance of 40 meters soon before the alleged sexual intercourse. She further says she sustained injuries on her legs. Vide page 151 and 163 of the brief. But the medical evidence does not support this position. When I consider all these matters I have to state here that her story that she was raped on the 23rd is very doubtful and unacceptable. I further hold that she is not a reliable witness.

If the prosecutrix in a rape case is not a reliable or believable witness, the evidence seeking to corroborate her

story cannot strengthen her evidence. Court should seek corroborative evidence only if the prosecutrix is a reliable witness. I therefore hold that Gunapala cannot corroborate the story of the prosecutrix. This view is supported by the judicial decision in **Sunil And Another vs. The Attorney General**⁽¹⁾ wherein His Lordship Justice Dheeraratne held thus:

“Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness’s evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration.”

As I pointed out earlier the evidence of Dr. Herath and Dr. Gunasekera contradicts the position taken up by the prosecutrix. I have earlier expressed the view that Dr. Lankathilaka Jayasinghe is not an independent medical expert. I have earlier expressed the view that Gunapala could not corroborate the evidence of the prosecutrix.

In a charge of rape why does Court expect the victim’s evidence to be corroborated by independent evidence. I now advert to this question. Charge of rape being the easiest charge that a woman can make against a man in this world, Courts in some cases of rape especially when the accused claims the allegation to be a false one or when the accused claims that sexual intercourse was performed with the consent of the woman, insist on corroboration of the testimony of the prosecutrix.

This may be because the act of sexual intercourse which may have been performed with the consent of the woman can later turn out to be an act of sexual intercourse without her consent. If I may put it in another way, a woman with whose consent the act of sexual intercourse was performed can later claim that it was done against her will or without her consent. This can be due to failure on the part of the man to fulfill what had been promised at the time or before the act of intercourse and/or she consented to an act which she is now ashamed of. In this connection I would like to quote a passage from *Glanville Williams Proof of Guilt 3rd Edition page 158, 159 -*

“On a charge of rape and similar offences it is the practice to instruct the jury that it is unsafe to convict on the uncorroborated evidence of the alleged victim. The rule applies to a charge of indecent assault, or any sexual offence, including an unnatural offence between males. There is a sound reason for it, because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl’s refusal to admit that she consented to an act of which she is now ashamed.”

In *Gurcharan Singh vs. State of Haryane AIR⁽²⁾* Indian Supreme Court held thus:

“As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.”

However I am mindful of the decision of the Indian Supreme Court in *Bhoginbhai Hirjibai vs. State of Gujarat⁽³⁾* wherein the Indian Supreme Court stated thus:

“In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury.”

Applying the principles laid down in the above judicial decisions, I hold that it is very dangerous to act on the uncorroborated testimony of a victim of a sexual offence. However, if the Court can without any hesitation, accept and believe that the story narrated by her is true then the Court can act on such evidence even without corroboration. I would like to state here that Court, in cases of rape, as a rule of prudence normally looks for corroboration of her testimony in order to satisfy its conscience that she is telling the truth. In the instant case medical evidence of Dr. Herath and Dr. Gunasekera contradicts her story.

I have considered the evidence in this case and am of the opinion that, in view of the observation that I have made above, it is dangerous to act on the testimony of the prosecutrix. For the reasons stated above I hold that the prosecution has not proved both charges against the accused-appellant. I therefore set aside the conviction and the sentence and acquit the accused-appellant of the charges levelled against him.

ABEYRATHNE, J. - I agree.

Appeal allowed.